

**78-1109**

Supreme Court, U.S.  
FILED

JAN 15 1979

MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

No. 78-----

MICHAEL PATRICK BOGLE and  
KENT ARTHUR MURRY,

*Petitioners,*

VS.

STATE OF FLORIDA,

*Respondent.*

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## **PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT**

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CONE, OWEN, WAGNER, NUGENT, JOHNSON  
& McKEOWN, P.A.

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MICHAEL PATRICK BOGLE and  
KENT ARTHUR MURRY,  
*Petitioners*,

vs.

STATE OF FLORIDA,  
*Respondent*.

### PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT

#### OPINION BELOW

The opinion (A4) of the Supreme Court of Florida denying Petitioners' Writ of Certiorari to the Fourth District Court of Appeal has not yet been reported.

#### JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). Petitioners assert a deprivation of rights secured by the United States Constitution.

The Order of the Florida Supreme Court Denying Petitioners' Petition for Writ of Certiorari was entered December 14, 1978. (A4)

## **CONSTITUTIONAL PROVISIONS INVOLVED**

This case involves violations of rights secured by the Fourth and Fourteenth Amendments to the United States Constitution.

## **QUESTIONS PRESENTED**

I.

NO PROBABLE CAUSE EXISTED WHICH WOULD JUSTIFY THE ARREST OF THE PETITIONERS OR THE SUBSEQUENT SEARCH OF THE AIRPLANE AND SEIZURE OF ITS CONTENTS WHERE THE ARRESTING OFFICERS WERE ACTING ON A MERE SUSPICION THAT THE BURLAP BAGS WHICH THEY OBSERVED INSIDE THE PLANE CONTAINED MARIJUANA.

II.

THE OBSERVATION OF THE BURLAP BAGS DID NOT CONSTITUTE A PLAIN VIEW SEIZURE WHERE THE ARRESTING OFFICERS WERE UNABLE TO SEE OR SMELL THE CONTENTS AND WHERE THEY HAD NO RIGHT TO BE WHERE THEY WERE.

III.

EVEN ASSUMING THE EXISTENCE OF PROBABLE CAUSE, THE SEARCH OF THE AIRPLANE AND SEIZURE OF THE CONTENTS WAS UNREASONABLE WHERE THE STATE FAILED TO SHOW THE EXISTENCE OF ANY EXIGENT CIRCUMSTANCES, NECESSITATING A WARRANTLESS SEARCH.

## **STATEMENT OF THE CASE AND FACTS**

Petitioners were charged with possession of marijuana with the intent to sell. Petitioners' Motion to Suppress Evidence Seized was denied. Both Petitioners subsequently pleaded nolo contendere, to possession of marijuana in excess of five grams, reserving the right to appeal the denial of their Motion to Suppress. They were adjudicated guilty and sentenced to indeterminate terms of six months to five years incarceration in the Department of Offender Rehabilitation on November 16, 1976. Notice of Appeal by both Petitioners was timely filed the same day. On October 25, 1977, the Fourth District Court of Appeal affirmed per curiam the decision of the trial Court. Petitioners filed a Petition for Rehearing, which was summarily denied by the Fourth District Court of Appeal. Petitioners filed a Petition for a Writ of Certiorari to the District Court of Appeal, Fourth District, which was summarily denied by the Florida Supreme Court on December 14, 1978, finding the Court without jurisdiction. Petitioners then filed a Motion to Stay the Mandate of the Court and the Florida Supreme Court entered an Order on December 29, 1978, staying the proceedings in the Florida Courts until January 15, 1979, to allow Petitioners to seek review in the Supreme Court of the United States and obtain any further stay from that Court. The Petitioners adopt the facts as stated by the Honorable Marvin U. Mounts, Jr., Circuit Judge, in his Order Denying the Petitioners' Motion to Suppress. (A7-A12)

## ARGUMENT

### I.

#### **No Probable Cause Existed Which Would Justify the Arrest of the Petitioners or the Subsequent Search of the Airplane and Seizure of Its Contents Where the Arresting Officers Were Acting on a Mere Suspicion That the Burlap Bags Which They Observed Inside the Plane Contained Marijuana.**

Implicit in the lower Court's Order is the finding that prior to the observation of the burlap bags inside the airplane, the information in the possession of the law enforcement officers (mere tips and other hearsay information which was not in any way specific as to the facts of the particular incident plus two BOLO alerts) did not constitute concrete probable cause. Up to this point, the officers were possessed of a mere suspicion which was not sufficient legal cause for an arrest. *U. S. v. Jackson*, 533 F.2d 314 (6th Cir. 1975); *U. S. v. Vasquez*, 534 F.2d 1142 (5th Cir. 1976).

In the instant case, the testimony of the agent, who allegedly saw the burlap bags, shows that his information relating to Petitioner Murry's reputation for smuggling drugs into this country, was based on triple hearsay from three unidentified persons. (A15-A16) The agent also stated that one informant gave reliable information in the past as to the activities of the two Petitioners, but failed to give any specific details. (A17, A18) In fact, the agent did not receive any information as to when or from where the Petitioners were to leave on their illegal mission and was surprised when they left the Lantana Airport on February 28, 1976. (A18-A19) The Circuit Judge showed

his concern when he stated, "There is no precise concrete information as to what this particular flight was about." (A19)

Also, the two BOLOS did not state that marijuana was aboard the airplane (one said that it was possibly smuggling in narcotics, and the other, that it would pick up a load of cocaine). (A8-A9) Moreover, neither BOLO was specific as to where the plane would land and they differed in their description of the plane's color.

At the time of arrest, the record reveals that the Petitioners were in a car more than one hundred yards from the airplane. (A20) The Petitioners were held at gunpoint, taken back to the aircraft, and a subsequent search ensued after Agent Bryant testified he saw what he believed to be marijuana in burlap sacks inside the airplane. (A20-A21)

From the foregoing, Petitioners submit that the record precludes a finding of probable cause based on untrustworthy information. An informer's tip is not adequate grounds for an arrest or search absent verified, consistent, reliability of the informer, an indication of how the informer came by his information, or details of the alleged criminal activities. *Spinelli v. U. S.*, 393 U.S. 410, 416, 89 S. Ct. 584, 589, 21 L. Ed.2d 637, 643-644. However, if independent investigation by government agents yields information consistent with and corroborative of the informer's tip, the warrantless arrest is legal. *Draper v. U. S.*, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed.2d 327 (1958). It is also clear that limited investigative stops can be predicated on facts that do not amount to probable cause for an arrest. Such stops must, however, be predicated upon facts that amount to a reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968). Even if an investigative stop was warranted un-

der the circumstances, the officers' conduct of holding guns on the Appellants constituted an arrest which must be predicated on the protective standards applied by the Courts as probable cause. Since the initial detention amounted to an illegal warrantless arrest absent probable cause, the subsequent search and evidence discovered therefrom were fruits of a poisonous tree and should have been suppressed. *Wong Sun v. U. S.*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 411 (1963). Even if the Court finds that the conduct of the officers constituted a justifiable investigative stop, the act of forcing the Petitioners to accompany the officers to the airplane and the subsequent search thereof, was an unreasonable extension of the scope of the stop. *Terry v. Ohio, supra*; *U. S. v. Chamblis*, 425 F. Supp. 1330 (E.D. Mich. 1977). It was a further detention and not based upon consent or probable cause. *U. S. v. Brigoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed.2d 607 (1975). Petitioners do not deny that a detention based on reasonable suspicion can be prolonged if the initial detention leads to the discovery of further incriminating information. However, the facts garnered by the officers during the initial detention must be enough to establish probable cause. *U. S. v. Solomon*, 528 F.2d 88 (9th Cir. 1975). However, that is not the case in the instant facts. The information on which the officers base their finding of probable cause was only discovered after the officers took the Petitioners over to the aircraft. This conduct was beyond the scope of the initial detention and must come under the protections afforded by the Fourth Amendment, Requirements of a Warrant or Probable Cause, neither of which was present. *U. S. v. Chamblis*, 425 F. Supp. 1330 (E.D. Mich. 1977).

Furthermore, the subsequent search of the aircraft was excessive as an invalid weapon search since the air-

craft was not within the immediate vicinity or reasonable area of the Petitioners so as to make unjustified any fear on the part of the agents for their own safety. *Terry v. Ohio, supra*.

Even assuming the act of approaching the plane was not beyond the scope of the initial detention, the sighting of the burlap bags was not incriminating information which tended to verify any concrete information of which the officers had knowledge. As Agent Bryant testified, marijuana may be packaged in many forms, from compressed bricks to hundred-pound bales. (A22) There was no testimony to the effect that cocaine, the only drug specifically mentioned in the BOLO, is usually, if ever, packaged in this form.

The only possible conclusion is that the observation of the agent, assuming that he could see anything at all through the window of the plane, was insufficient to verify the unreliable, unspecific, hearsay information which he then possessed. The agent was, in fact, acting on a mere hunch or suspicion.

Here it is clear that the sole purpose for searching the plane was to find contraband which would then give the officers probable cause to arrest the Petitioners. This was clearly an impermissible invasion of the right of privacy of the Petitioners, a right which our Courts have consistently stated must be jealously guarded. *Coolidge v. New Hampshire*, 403 U. S. 443, 455 (1971). The subsequent arrest of the Petitioners and the search and seizure of the airplane's contents incident thereto was therefore invalid as probable cause was clearly absent.

## II.

**The Observation of the Burlap Bags Did Not Constitute a "Plain View" Seizure Where the Arresting Officers Were Unable to See or Smell the Contents and Where They Had No Right to Be Where They Were.**

The Court below seemed to painfully justify the seizure on the basis that the view of the bales constituted a "plain view" seizure. (A11) This Petitioners aver was an erroneous application of that doctrine for two reasons. First of all, the contents of the package must be exposed to view in order for the "plain view" doctrine to apply. It is clear from the Court's Order that the Judge felt that the evidence produced by the State was insufficient to support the assertion that the agent could actually see and smell marijuana prior to opening the locked doors and conducting a search. (A10-A11) Secondly, the "plain view" doctrine does not apply in this case, since the agent had no right to be where he was. The U.S. Supreme Court has established that a "plain view" seizure is justified only where the officer inadvertently comes across an object while searching, pursuant to a warrant or where supported by one of the recognized exceptions to a warrant (hot pursuit, or incident to a lawful arrest). Also, it may be justified where the officer "is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object." *Coolidge, supra*, 403 U.S. at 465-66. At the time of the purported view by the officer, it is undisputed that no arrest had yet been made. Moreover, the Petitioners were, at this time, a good distance away from the aircraft and so it could not be said to be within their immediate control. It is therefore clear that the only purpose which the officer had in being at the aircraft, was to search for evidence by conducting an unauthorized "exploratory search from one object to another

until something incriminating at last emerges." *Coolidge, supra*, at 466; cf., *Stanley v. Georgia*, 394 U.S. 557, 571-72 (1969). Again, this is an impermissible infringement upon the privacy of the Petitioners, particularly when, as will be seen, there were no exigent circumstances justifying the agents' conduct.

## III.

**Even Assuming the Existence of Probable Cause, the Search of the Airplane and Seizure of the Contents Was Unreasonable Where the State Failed to Show the Existence of Any Exigent Circumstances, Necessitating a Warrantless Search.**

While it is true that a line of decisions, beginning with *Carroll v. U. S.*, 267 U.S. 132 (1925), have recognized a so-called "automobile exception" to the constitutional requirement of a warrant, "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge, supra*, 403 U.S. at 461-62. Instead, the *Carroll* Doctrine simply recognizes the obvious—that a moving vehicle on the open road presents a situation "where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll, supra*, 267 U.S. at 153; see also, *Almeida-Sanchez v. U. S.*, 413 U.S. 266, 269 (1973). Where there is no reasonable likelihood that the vehicle would or could be moved, the *Carroll* Doctrine is simply inapplicable. See e.g., *Coolidge, supra*; *Preston v. U. S.*, 376 U.S. 364 (1964). Even with probable cause, there must be exigent circumstances to justify taking away "the extra protection for privacy that a warrant affords." *Chambers v. Maroney*, 399 U.S. 42, 50 (1970). See also, *Cardwell v. Lewis*, 417 U.S. 583, 592 (1974).

Petitioners concede that the law applicable to warrantless searches of automobiles applies equally to airplanes. However, under the circumstances of this case, the officers were clearly unjustified in failing to secure a warrant, or to call Federal Customs Officials where the officers were aware of the authority of Customs to conduct a warrantless search without probable cause. (A22-A23) Apparently, Customs was aware of these surveillances and had been notified after the plane landed, and, in fact, arrived after the search had taken place. (A23) This is evidence of a failure to take the most reasonable and legal course available under the circumstances and, clearly no exigency existed which would justify the immediate warrantless search by officers, who had no legal authority to do so. Petitioners therefore cannot accept the lower Court's characterization of this as a mere "failure of various and separate law enforcement agencies to cooperate in their common cause" (A9), but rather Petitioners aver this was patently violative of their constitutional protections.

In addition, there were at least five officers on the scene at the time of the arrest and search. (A24) The Petitioners were in custody and posed no threat to the continued existence of the contraband. In fact, no showing was made by the State that the procurement of a warrant would have presented any hardship, and the lower Court was apparently conscious of this. (A9-A10) It is well settled that the burden of proving an exception to the warrant requirement is on the State. *Coolidge, supra*, 403 U.S. at 455; *U. S. v. Jeffers*, 342 U.S. 48, 51 (1951). This the State has failed to do.

For the foregoing reasons, the Petitioners respectfully request this Court to reverse the Order of the Circuit

Court for Palm Beach County and direct that the evidence seized as a result of the unlawful search be suppressed.

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& McKEOWN, P.A.

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(305) 655-8100

*Attorneys for Petitioners*

By DAVID ROTH

#### CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing has been furnished by mail, this 12th day of January, 1979, to the Office of the Attorney General, 214 Pan American Building, West Palm Beach, Florida.

DAVID ROTH

**APPENDIX**

IN THE SUPREME COURT OF FLORIDA

FRIDAY, DECEMBER 29, 1978

CASE NO. 53,095

DCA CASE NO. 76-2457

MICHAEL PATRICK BOGLE, ET AL.,  
Petitioners,

vs.

STATE OF FLORIDA,  
Respondent.

Petitioners' Motion to Stay Mandate is granted and proceedings in this Court, the District Court of Appeal, Fourth District, and the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, are hereby stayed to and including January 15, 1979, to allow petitioners to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

Test:

Sid J. White  
Clerk Supreme Court

By: /s/ (Illegible)  
Deputy Clerk

C  
cc: Hon. Clyde L. Heath, Clerk  
Hon. John B. Dunkle, Clerk  
Hon. Marvin U. Mounts, Jr., Judge

David Roth, Esquire  
of Cone, Owen, Wagner, Nugent,  
Johnson & McKeown

Charles Musgrove, Esquire

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SUPREME COURT OF FLORIDA

CASE NO. 53,095

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

76-2457

MICHAEL PATRICK BOGLE, et al.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

**MOTION TO STAY MANDATE**

COME NOW the Petitioners, MICHAEL PATRICK BOGLE and KENNETH MURRY, JR., by and through their undersigned attorneys, and respectfully move the Court to stay the mandate herein pending their filing of a Petition for Certiorari in the United States Supreme Court.

As grounds for this Motion, Petitioners would respectfully show the Court that if the mandate herein is stayed, they intend to proceed with a Petition for Certiorari in the Supreme Court of the United States.

Further, each defendant would show the Court that he has appeared at all times as he has been required to from the time he was initially arrested.

IT IS HEREBY CERTIFIED that a copy of the foregoing has been furnished to Charles Musgrove, Esquire, Assistant Attorney General, Pan American Building, West

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Palm Beach, Florida, by mail this 21st day of December, 1978.

Respectfully submitted,

Cone, Owen, Wagner, Nugent, Johnson & McKeown, P.A.  
507 North Olive Avenue  
Post Office Box 3466  
West Palm Beach, Florida 33402  
(305) 655 8100

By David Roth

CC: Each client

SUPREME COURT OF FLORIDA  
THURSDAY, DECEMBER 14, 1978  
CASE NO. 53,095

DISTRICT COURT OF APPEAL,  
FOURTH DISTRICT  
76-2457

MICHAEL PATRICK BOGLE,  
ET AL.,  
Petitioner,  
v.

STATE OF FLORIDA,  
Respondent

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ENGLAND, C.J., ADKINS, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

A True Copy

Test:

Sid J. White  
Clerk Supreme Court.

By: /s/ (Illegible)  
Deputy Clerk

H

cc: Hon. Clyde L. Heath, Clerk  
Hon. John B. Dunkle, Clerk  
Hon. Marvin U. Mounts, Jr., Judge  
David Roth, Esquire  
Basil S. Diamond, Esquire

IN THE  
DISTRICT COURT OF APPEAL OF THE STATE OF  
FLORIDA FOURTH DISTRICT

CASE NO. 76-2457 and 76-2458.

MICHAEL P. BOGLE and KENT ARTHUR MURRAY,  
Appellant.

v.

STATE OF FLORIDA,  
Appellee.

December 21, 1977

BY ORDER OF THE COURT:

ORDERED that the petition for rehearing filed October 31, 1977 is hereby denied.

A True Copy

/s/ Clyde L. Heath  
Clyde L. Heath  
Clerk

cc: Basil S. Diamond, Ass't. Attorney General  
David Roth, Attorney

IN THE  
 DISTRICT COURT OF APPEAL OF THE STATE OF  
 FLORIDA FOURTH DISTRICT  
 JULY TERM 1977

CASE NO. 76-2457.

MICHAEL P. BOGLE,  
 Appellant,

v.

STATE OF FLORIDA,  
 Appellee.

CASE NO. 76-2458.

KENT ARTHUR MURRAY,  
 Appellant,

v.

STATE OF FLORIDA,  
 Appellee.

Decision filed October 25, 1977

Consolidated appeals from the Circuit Court for Palm Beach County; Marvin U. Mounts, Jr., Judge.

Michael A. Nugent and David Roth of Cone, Owen, Wagner, Nugent, Johnson & McKeown, West Palm Beach, for appellants.

Robert L. Shevin, Attorney General, Tallahassee, and Marsha G. Madorsky and Basil S. Diamond, Assistant Attorneys General, West Palm Beach, for appellee.

Per Curiam.

Affirmed.

ALDERMAN, C.J., and LETTS, J., and HASTINGS,  
 ALCEE L., Associate Judge, concur.

IN THE  
 CIRCUIT COURT OF THE FIFTEENTH JUDICIAL  
 CIRCUIT OF FLORIDA IN AND FOR PALM  
 BEACH COUNTY  
 CRIMINAL DIVISION

CASE NOS. 76-531 and 76-529 CF

STATE OF FLORIDA

vs.

KENT A. MURRAY and  
 MICHAEL B. BOGLE,  
 Defendants.

**ORDER**

Two extensive hearings were held on the Defendants' Motion to Suppress, the last being June 24th, 1976.

The defendants were represented by Attorney David Roth and the State was represented by Assistant State Attorney Jerome Davis.

The testimony reflects that the law enforcement officers were supplied with several tips and other hearsay information which caused the officers to believe that the defendants were engaged in importing drugs into the State of Florida from foreign countries by means of an aircraft. While it is clear that this initial raw information never rose to the dignity of concrete probable cause, it is also quite clear that the officers approached their case with a great deal of care and planning and regarded their investigation as a very serious one. The record reflects that they devoted a good deal of time in conducting a surveillance of the defendants and of a small fixed wing

aircraft airport in Palm Beach County known as the Lantana Airport.

During this surveillance, the officers observed the defendants remove some of the passenger seats from a certain Cessna aircraft and store them in the trunk of their car. They observed the defendants leave in the aircraft on February 28th, 1976.

On February 29th, 1976 the officers continued their surveillance of the airport.

Just prior to the return of the aircraft that night to the Lantana Airport, with the defendants aboard, the officers engaged at the surveillance received two BE ON THE LOOKOUT MESSAGES from their department. These BOLOs are marked in evidence as Exhibit 9 and they read as follows:

"REQ ALLSO BOLO FOR ACFT N1258G, CESSNA 310, COLOR WHITE BLACK WITH RED TRIM. ACFT DEPTD BRITISH WEST INDIES THIS DATE TO SOUTH AMERICA TO PICKUP LOAD OF COCAINE. DUE TO RETURN TO FLA THIS EVENING. ON BOARD ARE KENT A MURRAY AND MICHAEL BOGLE. IF LOCATED PLACE UNDER SURVEILANCE AND CONTACT CUSTOMS (CUST 2) OR CALL 813-228-2175."

(Certain technical language contained in the BOLO IS omitted.)

"REQ BOLO FOR ZONES 4,6,7,8. SPEC ATTN FOLLOWING COUNTIES PALM BEACH, MARTIN, HIGHLAND, OKEECHOBEE, HENDRY, INDIAN RIVER, BROWARD. REQ BOLO FOR A CESSNA 310 - RED AND WHITE WITH BLACK STRIPE REGIS NBR N-1258G - OWNER IS BIRD LTD OUT OF ELGIN, ILLINOIS

2 MALES ABORD - MIKE VOGEL AND KEN MURRAY. PLANE POSS SMUGGLING IN NARCOTICS FROM FOREIGN COUNTRY.

PLANEMAY POSS COME INTO THE BOCA RATON AREA AS KEN MURRAY RESIDES IN BOCA RATON. PLANE DUE IN ANYTIME FROM NOW TILL DUSK. IF LOCATED PLS NOTIFY D E A - MIAMI - 305-350-4451."

(Certain technical language contained in the BOLO is omitted.)

These two BOLOs did not request that an arrest be made and they did not report that the defendants were actually carrying a large quantity of marijuana.

They did confirm the fact that the defendants were suspected of importing illegal drugs at that moment in time by two other separate law enforcement agencies.

It is clear that the arrival of this information justified the officers in stopping, questioning and detaining the defendants pursuant to Section 901.151, Florida Statutes (1975). That law was intended for just such a situation.

(The Court observes parenthetically that it is regrettable that this case demonstrates, once again, the failure of various and separate law enforcement agencies to co-operate in their common cause. Obviously, the officers would have been justified in holding the defendants at the airport as soon as they arrived and calling for United States Customs Officers to come and make a customs search of the aircraft. One of the officers involved in the investigation of this case for the Sheriff's Office acknowledged to the Court that he knew that the United States Customs Office could search this aircraft without any search and seizure questions being raised. The officers

failed to do this or to apply for a search warrant and hence this protracted Motion to Suppress.)

The defendants parked their aircraft, locked it and began to drive away in their car. This is important to note because there is agreement in the record that the officers never went inside of the aircraft until the defendants were stopped and returned to the aircraft and surrendered a key to open the aircraft.

Officer Bryant testified that he approached the aircraft in his automobile and that he stopped his vehicle a short distance away from the aircraft and was able to smell the odor of marijuana as soon as he stopped his vehicle and began to exit it. This phenomenon is vigorously questioned by the defense because the aircraft was indeed locked and the marijuana was baled and not open in a rough state. The defendants had stipulated that this particular officer was proficient and qualified in identifying marijuana visually and by all the other senses, I assume.

It is difficult for this Court to find from the evidence produced in this hearing that a person can smell the odor from a large quantity of marijuana which is baled and stored in a locked and closed aircraft.

The officer stated that he was also able to see bales in the aircraft and that he could see marijuana. Once again, this visual identification is vigorously protested by the defendants. The several polaroid photographs which were made at the scene do not disclose everything that a person might have been able to see from outside the aircraft on that evening. There are two photographs, Exhibit Numbers 2 and 8, which seem to reflect that marijuana is not readily apparent to the eye. One bale pictured on the right of Exhibit Number 2 might possibly

have afforded a view of the contents of the bale, but it is difficult to say that is so from an examination of the photograph because of various lighting reflections and the quality of the photograph. Other bales depicted in these two exhibits do suggest that marijuana was not readily visible, at least as depicted in these two particular exhibits. Nevertheless, the officer did testify that he was able to view "marijuana"; and—most important—the view of the interior, with its many bales, must lead inescapably to the conclusion that the bales contained marijuana—in the context of what had gone before.

At this juncture, when the officer can see that the arriving aircraft is heavily loaded with bales that must contain a leafy, vegetative substance, the totality of the evidence reaches the plateau of probable cause. The bales can contain nothing else: the view speaks for itself.

In *Russell v. State*, 266 So.2d 92, (Fla. 3rd DCA 1972) the Court stated:

*"Probable cause for arrest is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused man to be guilty. The officer need not actually see the law being violated nor must he satisfy himself beyond any question that a felony has been committed. The officer must arrive at a decision on probable cause, not by an analysis of the effect of each isolated circumstance, but rather by a conclusion as to what a reasonable man would have believed had he known all the facts available to the officer."* (Emphasis added.)

See also, *State v. Profera*, 239 So.2d 867 (Fla. DCA 3rd 1970).

Unlike the situations described in *Hyatt v. State*, 329 So.2d 43 (Fla. 1st DCA 1976) and *State v. Doherty*, 240 So.2d 342 (Fla. 4th DCA 1970), the officer here was able to see these rather obvious bales prior to making any arrests.

While there is little judicial reference to the very heavy contemporary traffic in illegal drugs which we read about and view almost daily in the media, the conclusion that any reasonable police officer would have to make in the context of his continuing investigation when he looked inside of this aircraft, would have to be that that was very large quantity of marijuana which had just been imported into the United States.

ACCORDINGLY, the Motion to Suppress is denied.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida this 22nd day of July, 1976.

/s/ Marvin Mounts, Jr.  
Marvin Mounts, Jr.,  
Circuit Judge

copies furnished

David Roth, Esquire  
State Attorney

IN THE  
CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIR-  
CUIT OF FLORIDA. IN AND FOR PALM BEACH  
COUNTY. CRIMINAL DIV.

CASE NO. 76-529 CF

STATE OF FLORIDA,  
Plaintiff,  
vs.  
MICHAEL P. BOGLE  
Defendant.

**MOTION TO SUPPRESS EVIDENCE**

COMES NOW the Defendant, MICHAEL P. BOGLE, by and through his undersigned attorneys, and pursuant to the Florida Rule of Criminal Procedure and moves to suppress the evidence herein, consisting of a quantity of marijuana, and as grounds therefore states:

Said evidence was illegally seized without a warrant.

As a factual basis for this Motion, the Defendant would respectfully show the Court that Officers of the Palm Beach County Sheriff's Office searched the aircraft in question without a search warrant and without probable cause to believe that there was contraband aboard said aircraft.

Said search occurred prior to the Defendant being placed arrest.

WHEREFORE, Defendant respectfully submits that the evidence herein ought be suppressed.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this ..... day of March, 1976,

to the STATE ATTORNEY, 430 Palm Beach County Court-house, West Palm Beach, Florida.

Cone, Wagner, Nugent, Johnson &  
McKeown  
507 North Olive Avenue  
P. O. Box 3466  
West Palm Beach, Florida 33402  
305/655-8100  
Attorneys for Defendant

By David Roth

### TESTIMONY

[71] Q. Okay. Tell us how you received that information and where you received it? A. I received it from a person who works for the Family Service Division in Delray.

Q. How did you receive it? A. By telephone.

Q. Where did you receive it? A. In my office.

Q. Tell us what happened? A. There was an initial call which was received by another agent in the Sheriff's office in my unit, vice, intelligence unit, from a person stating they wanted to give some information regarding the subject Murray.

I subsequently returned the call to the person in the person's office of the Family Services and was able to get her on the phone, at which time she said—

Mr. Roth: Your Honor, I'm going to object unless the person is identified. This is hearsay from a source that we don't know anything about except she works at the Family Services. There has been no [72] predicate laid whatsoever.

The Court: I will overrule the objection. You may continue.

The Witness: I spoke to the person who identified themselves as a counselor with the Family Services Division of Youth Services and this person stated that she had received information—

Mr. Roth: Now, Your Honor, this person is saying what this person received from another person. We have two unidentified persons relating double hearsay to this individual and I object until a proper predicate is laid.

The Court: Objection overruled.

Mr. Roth: Thank you, sir.

By Mr. Davis:

Q. Go ahead. A. That they had a client who was relating to Mr. Murray that had—

Mr. Roth: Your Honor, if he's going to say what this person told the second person which told the third person which related it to him, we now have third party hearsay with three people [73] unidentified. I presume your ruling is the same?

The Court: It is.

Mr. Roth: But I must object.

The Court: Okay. You have a continued objection.

By Mr. Davis:

Q. Go ahead, Agent Bryant. A. That provided information that the subject Murray was in the process of flying in marijuana from outside of the United States by aircraft.

Q. You received this information on the telephone? A. Yes, sir, I did. I asked to meet with the person personally and the person stated they were leaving for Atlanta and would be unable to make it in person.

Q. They refused to meet with you at that point? A. Only because of timing. They were leaving for Atlanta for two weeks.

Q. What did you do with this information? A. I took action in the form of surveillance of the airports in Palm Beach County. I had previous knowledge that Mr. Murray was a licensed pilot. \* \* \*

\* \* \*

[76] Q. At this point on February 21, 1976, you knew both defendants? A. Yes, sir, and I photographed him also previously prior to this.

Q. Tell us what happened on February 21, 1976? A. I spotted he and Mr. Bogle. They were standing

beside a twin engine Piper aircraft, 7-WWWGS were the numbers. The aircraft had the logo on the trail of Foremost Growing Shops out of Sarasota, Florida.

Q. How long did you keep surveillance on February 21st? A. Throughout the day and through the evening. They departed the Lantana Airport in that aircraft.

Q. They left from that airport on February 21st? A. Yes, sir.

Q. When did you set up your next surveillance? A. I observed them return to the Lantana Airport at 6:10 that evening and I was able to observe them and overhear the conversation when they returned.

Q. What did you overhear? A. Well, they wanted to know who I was. They didn't ask me but I heard them make the comments, "I wonder what that SOB is doing over there." \* \* \*

\* \* \*

[146] Q. The question is, is it now true that the next bit of information was on Saturday, the 21st, when you or another agent saw Mr. Murray at the Lantana Airport, is that correct? A. That is correct.

Q. The third bit of information is that an unknown informant told you some time subsequent thereto, "They were flying marijuana in from other countries," is that correct? A. That is correct.

Q. That is the third bit of intelligence information? A. Yes, sir.

Q. But that informant could not give you any details whatsoever as to the date, time, place, description of drugs or anything of this nature, is that right? A. Two approximate dates, yes, sir.

Q. Is the answer to that question yes or no? A. The answer to that question would be yes.

Q. All right. And of course, going back to number one fact concerning the lady who in Delray Beach said she heard from someone else who heard from someone else, she didn't have any details as to \* \* \*

\* \* \*

[79] Q. Do you recall prior to February 28th, had you received any confidential information? A. Yes, sir, I had.

Q. Who did you receive that information from? A. From numerous sources starting back as far as a year ago.

Q. Did you have a confidential informant at that point? A. Several that had provided information regarding it, plus out of state investigations.

Q. Okay. Had this confidential informant given you reliable information in the past about Mr. Murray and Mr. Bogle? A. Yes, sir.

Q. Now, had you received any information from this confidential informant prior to February 28th as to activities that Mr. Bogle and Mr. Murray would be involved in on the 29th? A. The information all fit in, yes, sir.

Q. What information did the confidential informant give you? A. Just information to the effect that they were flying narcotics in from foreign countries by aircraft.

Q. Did he say when they would be flying some more in? [80] A. Not prior. In fact, the day they left I didn't believe they would leave because the weather was so terrible.

Q. Now, once they left, were you sure on the 29th—I'm sorry, on the 28th, were you sure at that point they were going to pick up contraband?

Mr. Roth: Objection. It calls for a conclusion, Your Honor.

The Court: It does. Sustained.

By Mr. Davis:

Q. On February 28th when you set up your surveillance, what happened in relationship to the aircraft that you could observe? A. Well, I observed the aircraft land at the Lantana Airport and the weather was cloudy, very rainy. It was very poor weather. I observed Mr. Murray who brought the aircraft in, Mr. Bogle who met him there and several other individuals who met him there. They all gathered in one car. I assumed—

\* \* \*

[89] The Court: What, now?

Mr. Roth: That the informant in this particular case did not give any information concerning this flight and this load of marijuana prior to this date.

The Court: They were suspects clearly, Mr. Davis, but there is no precise concrete information as to what this particular flight was about.

Mr. Davis: I think they would have a right to look inside the aircraft with the information they had and I think the photographs showed they looked into the aircraft before going in.

The Court: The photographs don't show that.

Mr. Davis: I think the photographs were made from the outside.

The Court: Which one of those ten exhibits was made from the outside looking in?

Mr. Davis: That's the one involving the front of the aircraft.

The Court: What was the client's manslaughter case, Mr. Roth?

Mr. Roth: A traffic accident, Judge.

\* \* \*

[20] Q. Did you see anything at that point? A. No, I didn't.

Q. How far did you drive, to the best of your recollection, before anything unusual happened? A. I would think a hundred, two hundred yards.

Q. What happened at that point? A. At that point we saw two men come walking across the field on our right and come towards the car. They had guns out. When we saw them coming, I put the brakes on the car and put the car in park and they came over.

I believe I put the windows down at that point and they came over on either side of the car and put their guns in our faces and told us to get out slowly.

Q. Did you follow their orders? A. I followed their orders.

Q. Did they then place you on the ground? A. They then placed us against the car with our hands on the car. Mr. Murray said, "I have a knife, it's in a sheath, a pocket knife in a sheath on my side. I don't want to use it. It's just there, would you please take it?" At that point, one of [21] the agents threw Mr. Murray down on the ground and put his face in the dirt and said, "Hey, he has a knife, be careful of him."

Q. What did they do with you? A. They pulled me to the back of the car. Then they walked me up to the front of the car and laid me down next to Mr. Murray with my face in the sand.

Q. Up until this point, to the best of your knowledge, did any police officers approach the aircraft with lights of any nature whatsoever? A. Absolutely not, no.

Q. After you were on the ground, you and Mr. Murray, did you hear one law enforcement officer say anything to another law enforcement officer concerning the contents of the aircraft? A. After we were on the ground, I believe one of the other officers came over, one of the agents came over, and said, The officer that

had us at gunpoint on the ground said, "Is it there?" And the other one said, "Yes, it is."

Q. How long a period of time elapsed from the time you got into the car until you heard that law enforcement officer ask that question and receive that answer. A. I would imagine it was at least five minutes.

[22] Q. Do you recall the name of the officer that had the weapon pointed at you as you were on the ground? A. The one who had the weapon pointed at me was Greg Thomas and the other one was Larry Pierce.

Q. Thereafter, did you see any law enforcement officer search the plane or were you taken away from the scene? A. We were put in an automobile, in a police car right at the airplane, I think the keys were taken from Mr. Murray and I believe I did see them go into the plane before we left. At that point we had been placed under arrest and read our rights twice and signed cards.

Q. Did the law enforcement officers at that point approach the plane with their lights? A. Yes, they did.

Q. Were you presented at any time a search warrant to search that aircraft? A. No, sir.

Q. Did you or to your knowledge did Mr. Murray at any time consent to the search of that aircraft? A. No, we didn't.

\* \* \*

[69] Q. Agent Bryant, let me ask you prior to February 29, 1976, had you worked other smuggling cases prior to this? A. Yes, sir.

Q. And do you recall—

Mr. Roth: Objection, Your Honor. This is not a smuggling case. My client is charged with possession of marijuana. Neither client is charged with smuggling.

The Court: Objection overruled. Go ahead.

By Mr. Davis:

Q. In working those prior smuggling cases, have you actually worked marijuana itself? A. Yes, sir, I have.

Q. In your experience as a police officer prior to February 29, 1976, what packaging have you come in contact with when marijuana was smuggled into the United States from outside the United States? A. All forms from compressed bricks, to the hundred pound bales, to the bags and to trash compactor types. Hundred pound bales, bulk and hundred pound bales split in two fifties, all forms.

Q. Have you also come in contact with burlap bags? A. Yes, sir.

\* \* \*

[156] The Witness: That could be very possible. Like I say, that was Agent Pierce and Captain Fogelman who stopped them.

The Court: But they were in the car when they were stopped, is that not correct, or do you know?

The Witness: To my knowledge, they were, yes, sir. When I saw them they were at the car.

The Court: Were you aware at this date, the 29th day of February, that the United States Customs Service has the right to search any incoming aircraft or other vessels or vehicles without a search warrant or probable cause to make an arrest, that that is an absolute governmental right?

The Witness: Well, if it is not manifested cargo, sir.

The Court: With the exception of manifested cargo, were you aware they could do that?

The Witness: The United States Customs could [157] search?

The Court: Yes.

The Witness: Yes, I am aware of the customs law, sir, yes, sir.

The Court: They don't need a search warrant to search or an arrest warrant or probable cause to believe that a crime has been committed?

The Witness: Yes, sir, within fifty miles of the border. I do understand that, sir.

Mr. Roth: One further question, Judge.

By Mr. Roth:

Q. Agent Bryant, are you saying now that Larry Pierce who stopped them in their vehicle saw the marijuana before you saw it? A. I have been under the rule and have not discussed the case with Agent Pierce.

Q. You were there. Were you the first officer driving up there with your headlights into—the aircraft so you could see whatever you saw? A. We were both approaching from two different angles. We were both approaching the plane.

\* \* \*

[131] By Mr. Roth:

Q. Was Customs ever called to come down and conduct a Customs investigation of this aircraft on February the 29th at 9:30 p.m.? A. Yes, sir, they were.

Q. Did they come down? A. Yes, sir, they did.

Q. Did they conduct a Customs investigation? A. They sent an agent to the scene, yes, sir.

Q. Before or after you searched the aircraft? A. It would have been after.

Q. You testified the last time, and you correct me if I am mistaken, from all these confidential sources that you have and all the information you had on February 28th, 1976, you didn't actually believe that Mr. Murray and Mr. Bogle would leave Palm Beach County that date, is that correct, sir? A. Would you repeat the question? I'm sorry.

Q. Based on all the information that you had, all these confidential sources, the third person hearsay that Mr. Murray was involved in some way through some employee at the South county area, every bit of information that you had, you \* \* \*

\* \* \*

[81] By Mr. Davis:

Q. Okay. On the 29th did the aircraft arrive back in Palm Beach County? A. Yes, sir, it did.

Q. Approximately what time did it arrive? A. Approximately 9:35 p.m.

Q. Had you set up some surveillance at the Lantana Airport at that point? A. Yes, sir.

Q. How many officers had you had out there at that point? A. Well, in excess of five.

Q. In excess of five officers? A. Yes, sir.

Q. Okay. Prior to that, did you receive any bolos concerning this particular aircraft? A. Yes, sir, I did.

Mr. Davis: I would like to have this marked as State's Exhibit nine for identification purposes only.

Mr. Roth: No objection to either document going into evidence.

The Court: Received without objection.